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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 794

SAM TITLE, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPH FORER
DAVID REIN
711 14th St., N. W.
Washington, D. C.

DANIEL G. MARSHALL
SEYMOUR MANDEL
4041 Marlton Ave.
Los Angeles, California

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit affirming an order of the United States District Court for the Southern District of California which denied petitioner's motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate a denaturalization judgment.

OPINION BELOW

The opinion below has not yet been reported. It appears at II R. 3-7 and in Appendix B of this petition.

The District Court issued no opinion on its denial of the motion to vacate the denaturalization judgment. Its opinion in support of its judgment denaturalizing petitioner is reported at 132 F. Supp. 185.

JURISDICTION

The judgment below (II R. 8 and Appendix A herein) was entered on January 6, 1959. Jurisdiction of this Court exists under 28 U. S. Code, sec. 1254(1).

QUESTIONS PRESENTED

1. Whether a denaturalization judgment is "void" under clause (4) of Rule 60(b), Federal Rules of Civil Procedure, because of the government's failure to file in the denaturalization proceeding an affidavit of good cause, the filing of which is a statutory prerequisite to the institution and maintenance of a denaturalization suit.

2. Whether a District Court's erroneous determination in a denaturalization suit that the action could be maintained without the filing of the statutory good-cause affidavit has res judicata effect so as to bar power to vacate the denaturalization judgment under clause (4) of Rule 60(b).

3. Whether vacation of a denaturalization judgment is required under Rule 60(b) — whether under clause (4) as "void," or under clause (5) as of inequitable prospective application, or under clause (6) "for any other reason justifying relief"—where the following circumstances exist:

(a) The judgment is concededly erroneous because of the government's non-compliance with the statutory requirement for filing a good-cause affidavit;

(b) The judgment is not supported by adequate evidence;

(c) The judgment, if allowed to stand, will result in the deportation of petitioner, a long-time resident of the United States; and

(d) At the time petitioner failed to prosecute his direct appeal, erroneous decisions of federal Circuit and District courts, corrected by this Court only after the appeal was dismissed, made his appeal appear hopeless.

STATUTES AND RULE INVOLVED

Section 340(a) of the Immigration and Nationality Act, 66 Stat. 163, 260, 8 U. S. Code, sec. 1451, provides, in part:

"Sec. 340. (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively . . ."

Section 338(a) of the Nationality Act of 1940, 54 Stat. 1137, 1158, provided:

"It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of ntauralization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured."

Rule 60(b) of the Federal Rules of Civil Procedure provides:

"Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or

suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

STATEMENT OF THE CASE

On October 24, 1941, petitioner was naturalized by the United States District Court for the Southern District of California (I R. 30; II R. 3). Under section 305 of the Nationality Act of 1940, 54 Stat. 1137, 1141, then in effect, a person was ineligible for naturalization if he had been a member of an organization advocating violent overthrow of the Government at any time during a period of ten years preceding the filing of the petition for naturalization. There was no provision in the statute forbidding naturalization for membership in the Communist Party *eo nomine*.

On October 21, 1954 (I R. 10), the government filed a complaint in the same District seeking revocation of the naturalization judgment on two grounds (I R. 2-10). The first, pleaded under section 338(a) of the Immigration and Nationality Act, 66 Stat. 260, 8 U. S. Code, sec. 1451, alleged in substance that petitioner had obtained naturalization by concealing and misrepresenting membership in the Communist Party. The second, pleaded under section 338(a) of

the Nationality Act of 1940, 54 Stat. 1158,[1] alleged in substance that the naturalization was illegally procured because the petitioner had been a member of the Communist Party, an organization which advocated violent overthrow, within the ten years preceding filing of his naturalization petition.

An affidavit of good cause, required by both section 340(a) of the Immigration and Nationality Act and section 338(a) of the Nationality Act of 1940, was not filed either with the complaint or at any other time (II R. 3). The petitioner moved to dismiss the complaint on the ground, among others, that the court lacked jurisdiction because of the government's failure to file a good-cause affidavit (I R. 12, 14). The motion was denied (I R. 23).

After trial, the District Court on July 14, 1955 entered a judgment revoking petitioner's citizenship and enjoining him from claiming any rights or privileges under the naturalization judgment (I R. 30-31). The court's opinion, reported in *United States* v. *Title*, 132 F. Supp. 185, shows that the court found that the naturalization had been obtained by concealment, on the basis of the following evidence and reasoning:

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[1] The complaint alleged (I R. 7-8) that this section of the 1940 act "was continued in force and effect" by the Immigration and Nationality Act. The contrary, is, however, true. Section 340 of the Immigration and Nationality Act wholly superseded for denaturalization cases instituted after its effective date the prior denaturalization statute. Thereby it eliminated for such cases illegal procurement as a ground for denaturalization. *United States* v. *Stromberg*, 227 F. 2d 903; *United States* v. *Chandler*, 132 F. Supp. 650, 656-676; *United States* v. *Harajovic*, 125 F. Supp. 659; *United States* v. *Miller*, 152 F. Supp. 27, 29-30.

(1) Petitioner was an active member of the Communist Party from 1936 to 1942, and was within that period a local organizer for the Party.

(2) Communist writings show that the Communist Party always advocated force and violence as the means of attaining its objectives.

(3) Petitioner must have known that the Communist Party advocated violence because he is above average in intelligence and education and was an active member and organizer.

(4) Accordingly, by not volunteering in the denaturalization proceedings that he had been a Party member, petitioner wilfully concealed information important to the proceedings.

There was no suggestion by the trial court that petitioner was ever asked or answered in the naturalization proceedings whether he had belonged to the Communist Party or to any organization advocating violent overthrow.[2] There was no finding or suggestion that the petitioner himself ever advocated violent overthrow, nor was any evidence cited to show that petitioner shared the trial court's interpretation of Communist doctrine as favoring violent overthrow of the United States government.

On September 8, 1955, petitioner noticed an appeal from the denaturalization judgment to the Ninth Circuit (I R. 32). On February 27, 1956, the Ninth Circuit dismissed the appeal for failure of prosecution (I R. 33-34).

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[2] The trial court found that petitioner had denied membership in any organization "teaching disbelief in or opposition to organized government". (132 F. Supp. at 189). It was not suggested that the Communist Party was such an organization.

On April 30, 1956, this Court in *United States* v. *Zucca*, 351 U. S. 91, affirmed the dismissal of a denaturalization complaint because of the government's failure to file the statutory affidavit of good cause. Before then it had been firmly established in the Ninth Circuit that filing of the affidavit was unnecessary. *Schwinn* v. *United States*, 112 F. 2d 74, aff'd, 311 U. S. 616.

Following *Zucca*, the lower federal courts held that failure to file the affidavit with the complaint was not a jurisdictional defect but merely a procedural omission, which could be cured by filing the affidavit after initiation of the action. See *United States* v. *Miller*, 152 F. Supp. 27, and cases collected therein at 29; *United States* v. *Matles*, 247 F. 2d 378, and *United States* v. *Lucchese*, 247 F. 2d 123, both rev'd, 356 U. S. 256. It was not until this Court's decision of April 7, 1958 in *Matles* v. *United States*, 356 U. S. 256, that it was settled that a late filing of the affidavit required reversal of a denaturalization judgment.

On May 21, 1958, petitioner filed in the District Court a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate the denaturalization judgment (I R. 36-37). Before the motion was heard, this Court on May 26, 1958, decided *Nowak* v. *United States*, 356 U. S. 660, and *Maisenberg* v. *United States*, 356 U. S. 670. These cases clearly establish that the denaturalization judgment in this case was not supported by adequate evidence (*infra*, pp. 18-20). On June 9, 1958, the District Court heard petitioner's 60(b) motion, and on June 19, 1958, it denied the motion (I R. 43, 44; II R. 4). The Court of Appeals affirmed (II R. 3-7).

REASONS FOR GRANTING THE WRIT

This case presents issues, not heretofore decided by this Court, regarding the application of Rule 60(b) to denaturalization judgments. The court below, we submit, wrongly decided novel questions important to the administration of the nationality laws and to the rights of naturalized citizens. In doing so, the court evolved principles which will in various types of cases frustrate the Rule's purpose of liberalizing escape from final but unjust judgments. See *Klapprott* v. *United States*, 335 U. S. 601, 609; 7 Moore's Federal Practice (2d ed. 1955) 214. Finally, the decision below not only perpetuates an unjust and illegal deprivation of the citizenship of an individual caught in an uneven contest with the federal government, but also insures that he will suffer a wrongful government deprivation of his personal liberty.

Three clauses of Rule 60(b) are involved: clause (4), which authorizes relief from a "void" judgment; that portion of clause (5) which allows relief if "it is no longer equitable that the judgment should have prospective application"; and clause (6), which gives residual relief power for "any other reason justifying relief from the operation of the judgment".

Applicability of Clause (4)

The issue of voidness under clause (4) arises from the fact that an affidavit of good cause was not filed in the denaturalization case, although required by the statute as a prerequisite to the institution and maintenance of the action. *United States* v. *Zucca*, 351 U. S. 91; *Matles* v. *United States*, 356 U. S. 256. The court below recognized that the denaturalization judgment was erroneous on this account (II R. 3), but held

that the error did not void the judgment. It thus denied that power to grant relief existed under clause (4). The grounds given for holding that the judgment was not void were: (1) *Zucca* referred to the good-cause affidavit not as a "jurisdictional" prerequisite, but as a "procedural" prerequisite; and (2) even if the affidavit was a jurisdictional prerequisite, the District Court's determination that it had jurisdiction was *res judicata* and hence subject to review only on appeal.

The first ground for the holding obviously makes an unsupportable distinction for which the court below cited no authority and gave no reason. Many, perhaps most, jurisdictional defects are "procedural." On this point the holding is flatly inconsistent with *United States* v. *Ness*, 245 U. S. 319, and *Maney* v. *United States*, 278 U. S. 17, which held that noncompliance with a statutory requirement for filing a certificate of arrival with a naturalization petition made a naturalization judgment void and subject to collateral attack even though the jurisdictional issue had been contested by the United States in the naturalization proceeding. And *cf. United States* v. *Kiriaze*, 172 F. 2d 1000, holding a naturalization judgment void because of a lack of strict compliance with the statutory requirement for notice by publication.

The fact is that the spurious dichotomy between "procedural" and "jurisdictional" requirements has had an inglorious history as applied to the statutory good-cause affidavit. Before this Court's decision in *Zucca*, this fallacious distinction was the rationalization of the Ninth Circuit and other courts for erroneous holdings that filing of an affidavit of good cause could be dispensed with altogether. *Schwinn*

v. *United States*, 112 F. 2d 74; *United States* v. *Tuteur*, 215 F. 2d 415; *United States* v. *Collins*, 131 F. Supp. 545; *United States* v. *Shinkevich*, 131 F. Supp. 547. After *Zucca* and before this Court's decision in *Matles*, the distinction was used to rationalize the equally erroneous holdings that filing an affidavit of good cause after institution of the action saved the denaturalization case. (Cases cited *supra*, p. 8.)

The second ground of the holding below—that the issue of voidness was concluded by the District Court's own determination of its jurisdiction—is certainly of major significance. Although *res judicata* is, as will appear, sometimes applied even to jurisdictional determinations so as to prevent collateral attack of a judgment in an independent proceeding, this case is, so far as we are aware, the first in which the bootstrap principle has been made applicable to Rule 60(b), which provides for relief by motion in the same proceeding. Obviously, this holding virtually eliminates clause (4) from Rule 60(b), particularly since *res judicata*, if it applies, concludes jurisdictional issues which might have been litigated as well as those which actually were. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371. For this reason alone, review by this Court is imperative. In addition, the reliance on *res judicata* by the court below and its amalgamation of a Rule 60(b)(4) case with a collateral attack situation is contrary to *Klapprott* v. *United States*, 335 U. S. 601. In that case, the Court divided evenly on whether a denaturalization judgment was void under Rule 60(b) because entered by default. But neither side suggested that this issue was precluded by giving *res judicata* effect to the District Court's determination of its jurisdiction.

Even if a motion under clause (4) of Rule 60(b) is governed by the same principles as though it were an independent collateral attack, there still remains a major question whether these rules insulate a denaturalization judgment issued without the filing of a good-cause affidavit. The applicability of *res judicata* to jurisdictional questions, exemplified by such cases as *Chicot County, supra;* is not as unyielding as the court below assumed. The same term of Court which decided *Chicot County* also produced *United States* v. *U. S. Fidelity & Guaranty Co.,* 309 U. S. 506, and *Kalb* v. *Feuerstein,* 308 U. S. 433. Both of these decisions, in holding judgments void, refused to give *res judicata* effect to jurisdictional determinations because of countervailing considerations which overrode the considerations favoring the finality of judgments. In the *U. S. Fidelity & Guaranty Co.* case, the Court pointed out (at 514, footnote references omitted):

> "In the Chicot County Drainage Dist. Co. Case no inflexible rule as to collateral objection in general to judgments was declared. We explicitly limited our examination to the effect of a subsequent invalidation of the applicable jurisdictional statute upon an existing judgment in bankruptcy. To this extent the case definitely extended the area of adjudications that may not be the subject of collateral attack. No examination was made of the susceptibility to such objection of numerous groups of judgments concerning status, extra-territorial action of courts, or strictly jurisdictional and quasi-jurisidictional facts. No solution was attempted of the legal results of a collision between the desirable principle that rights may be adequately vindicated through a single trial of an issue and the sovereign right of immunity from suit. We are of the

opinion, however, that without legislative action the doctrine of immunity should prevail."

Similarly, *Bowen* v. *Johnston*, 306 U. S. 19, 27, recognized that the rule that *res judicata* extends to jurisdictional determinations "is not so inflexible that it may not yield to exceptional circumstances." And *United States* v. *Williams*, 341 U. S. 58, while holding that a particular jurisdictional determination was *res judicata*, recognized that this did not establish an immutable rule, that *Kalb* v. *Feuerstein* and *Bowen* v. *Johnston* retained vigor, and that "there are certain essential facts that must exist to give any power to a court" (at 66). See also *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165; *Ex Parte Burrus*, 136 U. S. 586; *Ex Parte Sawyer*, 124 U. S. 200.

Whether or not a jurisdictional determination is *res judicata* is not subject to easy generalization, but requires an "analytical dissection of jurisdiction doctrines in each specific situation presented." Boskey and Braucher, *Jurisdiction and Collateral Attack: October Term, 1939*, 40 Col. L. Rev. 1006, 1029. This analysis permits an informed choice, such as was made in *U. S. Fidelity & Guaranty Co., supra*, where there is "a collision" between finality and the policy involved in the particular jurisdictional requirement. As stated in Restatement, Judgments, section 10:

> "Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction."

Applying this approach, we submit that the following considerations warrant decision by this Court that non-filing of the good-cause affidavit is a jurisdictional defect which voids the naturalization judgment and which cannot be saved by giving *res judicata* effect to the trial court's determination that the affidavit was unnecessary.

1. In *Zucca* and *Matles*, this Court stated that filing of the affidavit with the complaint is, by statutory enactment, a "prerequisite" to the institution and maintenance of the denaturalization action. Whether or not the "prerequisite" is procedural is, as we have seen, immaterial. The natural meaning of the term "prerequisite" indicates that non-compliance with it results in a nugatory proceeding. As stated in *Klapprott* v. *United States*, *supra*, at 609, "The judgment is void if the hearing of evidence is a legal prerequisite to rendition of a valid default judgment in denaturalization proceedings."

United States v. *Zucca*, *supra*, approved the view that the filing of the affidavit was "necessary to give a United States attorney authority to institute proceedings in any court for the cancellation of a naturalization certificate" (at 96). Since the suit, therefore, was not authorized by the government, there was nothing before the court on which it could hear evidence and render judgment. The situation is comparable to a conviction of a felony entered without an indictment, in which case, of course, the judgment is entirely void. See *Ex Parte Bain*, 121 U. S. 1; *Ex Parte Sawyer*, 124 U. S. 200, 201.

This analysis is confirmed by *Matles* v. *United States*, *supra*. There, because of the belated filing of the affidavit, this Court not only reversed the denatural-

ization judgment, but also set aside a contempt sentence for the defendant's refusal to testify on deposition. Yet if the naturalization proceeding had supplied any basis at all for judicial power, such an intermediate, collateral order should have been sustained even if the complaint was dismissable. *Cf. Maggio* v. *Zeitz*, 333 U. S. 56, 68-69; *Oriel* v. *Russell*, 278 U. S. 358; *United States* v. *United Mine Workers*, 330 U. S. 258.

2. The affidavit is an explicit statutory requirement which is part of a "self-contained, exclusive procedure" designed "with a view to protecting the Government against fraud while safeguarding citizenship from abrogation except by a clearly defined procedure." The statutory scheme establishes "a detailed, safeguarded procedure" which "covers the whole ground," and "every national interest is thereby protected." *Bindczyck* v. *Finucane*, 342 U. S. 76, 83-84; *United States* v. *Zucca*, *supra*, at 99.

In *Kalb* v. *Feuerstein*, *supra*, this Court held that non-compliance with a statutory precondition resulted in a void judgment; and that in view of the Congressional policy behind the condition, the doctrine of *res judicata* of jurisdictional determinations could not prevail. The Court applied the same principle, precisely in the nationality field and with regard to a document-filing condition, in *United States* v. *Ness* and *Maney* v. *United States*, *supra*.

Section 10(2) of the Restatement, Judgments, provides in part that "among the factors appropriate to be considered in determining that collateral attack should be permitted are that (a) the lack of jurisdiction over the subject matter was clear; (b) the deter-

mination as to jurisdiction depended upon a question of law rather than of fact; . . . (e) the policy against the court's acting beyond its jurisdiction is strong."

The statute, as well as *Zucca* and *Matles*, demonstrates that there is a strong policy against a court's proceeding in a denaturalization case without compliance with the affidavit requirement.

3. In contrast, the competing policy of finality is peculiarly weak in the nationality field. "This Court has held that because a naturalization judgment involves interests of a different order from those involved in other civil proceedings, the annulment of such a judgment is guided by considerations qualitatively different from those that govern annulment of ordinary judgments." *Klapprott* v. *United States*, *supra*, at 628 (Frankfurter, J. dissenting).

Denationalization, in the first place, is "the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in development." *Trop* v. *Dulles*, 356 U. S. 86, 101. In a denaturalization case, these drastic consequences are incurred in a litigation in which the individual faces the superior power and resources of the government. If a denaturalization judgment is annulled, there is no disturbance of property rights, no adverse adjustment of the status quo, no chance of injuring third persons. The government is not harmed by a reacquisition of citizenship by one who should not have been deprived of it. Furthermore, if an erroneous denaturalization judgment is allowed to stand, it may, and in this case will, result in deportation to the added injury of the

individual and his family.[3] This deportation will be erroneous because predicated on an erroneous denaturalization judgment, but it will be unassailable on that account if the denaturalization judgment is not held void in this proceeding.[4] In the present case, petitioner has lived in the United States for 36 years, since he was 16 years old. (See *United States* v. *Title*, 132 F. Supp. 185, 189.) If the erroneous denaturalization judgment is allowed to stand, he will be exiled. It seems incredible that the government, having inflicted on him the injury of an illegal cancellation of his citizenship, should be able to utilize the illegal judgment further so as to ruin his life completely.

All these considerations demonstrate that the court below erred in holding that the denaturalization judgment was not void for the purposes of Rule 60(b). The same considerations also show that vacation of the void judgment was required. Also relevant on this latter point is the fact that the denaturalization judgment is unjust because it was palpably not supported by the evidence. We will deal with this factor, however, in our discussion of clauses (5) and (6) of Rule 60(b).

Applicability of Clauses (5) and (6)

These two clauses may fruitfully be considered together, since they obviously involve similar and over-

[3] Sec. 241(a)(6)(C) of the Immigration and Nationality Act, 8 U.S.C. sec. 1251(a)(6)(C), requires deportation of any alien who has been a member of the Communist Party after entry.

[4] Obviously, if the denaturalization judgment is not void for the purposes of Rule 60(b), it is a fortiori immune to collateral attack in a deportation proceeding. Moreover, petitioner could not make such a collateral attack without risking contempt for violation of the judgment's provision enjoining him from claiming "any rights, privileges or advantages whatsoever" under his naturalization order (I R. 31).

lapping considerations. Clause (5) depends on inequitable prospective application. Clause (6), "for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott* v. *United States, supra,* at 615. In this case, both inequity and injustice will flow from retention of the denaturalization judgment.

To begin with, the denaturalization was not only erroneous because of non-compliance with the affidavit prerequisite. It was also unjust because it was rendered on inadequate and irrational evidence. The District Court did not find that petitioner had falsely denied membership in the Communist Party or in an oragnization advocating violent overthrow. Petitioner was not asked such a question. His sin was that he did not volunteer, without being asked, that he had been a member of the Party.

This omission obviously supplied no rational basis for a finding of "concealment of a material fact" unless the Party advocated violent overthrow and the petitioner knew it. *Nowak* v. *United States,* 356 U. S. 660. The District Court's determination that the Party advocated insurrectionary doctrine was, however, derived from a subjective textual analysis whose unsoundness is demonstrated by *Schneiderman* v. *United States,* 320 U. S. 118, and *Yates* v. *United States,* 354 U. S. 298. The finding that petitioner knew that the Communist Party advocated violence was an unsupportable inference from nothing more than membership and office-holding in the party, facts which were held insufficient to establish such knowledge for denaturalization purposes in *Nowak* v.

United States, supra, and *Maisenberg* v. *United States,* 356 U. S. 670. In *Nowak* this Court stated:

"We believe that the Government has adequately proved that Nowak was a member of the Party during the pertinent five-year period. But even assuming that the evidence of the illegal advocacy of the Party was sufficient, see Yates v. United States, supra, (354 U. S. at 319-322), and that, despite the doubts expressed in Schneiderman v. United States, supra, (320 U. S. at 136, 154), lack of 'attachment' could be proved by this method, we nevertheless hold that the Government cannot prevail on this record. For we are of the opinion that it has not been established that Nowak knew of the Party's illegal advocacy.

"The fact that Nowak was an active member and functionary in the Party does not of itself suffice to establish this vital link in the Government's chain of proof. See generally Schneiderman v. United States (U. S.) supra; cf. Yates v. United States, supra (354 U. S. at 329, 330). Nor is the Government's burden satisfied on the crucial issue of Nowak's awareness of the illegal aspects of the Party's program by the evidence of his attendance at 'closed' Party meetings, or by the disputed evidence as to his alleged concealment of Party membership." (At 665-666.)

"Under the strict standard of proof by which this case must be judged, the record shows at best from the Government's standpoint that Nowak was an active member and functionary of the Communist Party. But this proof does not suffice to make out the Government's case, for Congress in the Nationality Act of 1940 did not make membership or holding office in the Communist Party a ground for loss of citizenship. We conclude that the Government has failed to prove its charges of fraud and lack of 'attachment' against this

petitioner by the 'clear, unequivocal, and convincing' evidence which is required in denaturalization cases." (At 668.)

Ackermann v. *United States*, 340 U. S. 193, denied relief under clause (6) of Rule 60(b) though a denaturalization judgment was not supported by adequate evidence and an appeal was not taken because of financial hardship. Even so Justices Black, Frankfurter and Douglas dissented, observing that the decision "neutralizes the humane spirit of the Rule and thereby frustrates its purpose" (at 202).

If *Ackermann* still retains vitality, nevertheless it does not govern this case. Here there are additional, compelling factors. First, here the denaturalization judgment was not only without evidentiary support, but was entered in a proceeding which was irregularly initiated and maintained because of non-compliance with the affidavit requirement. Second, if this doubly-erroneous judgment is allowed to stand, it will, as we have seen, supply an unassailable predicate for deporting petitioner, a long-time resident of this country. This deportation will be on a ground whose harshness and purposelessness were noted in *Galvan* v. *Press*, 347 U. S. 522, 530.

Finally, petitioner's failure to prosecute his appeal is, after all, largely attributable to a malfunctioning of our judicial system. Meritorious though his case was, his appeal looked hopeless at the time. The Ninth Circuit had already decided that a good-cause affidavit did not have to be filed (*Schwinn* v. *United States*, 112 F. 2d 74, aff'd, 311 U. S. 616), and this was not corrected till this Court's decision in *Zucca*, which came after the appeal had been dismissed. Preceding

dismissal of petitioner's appeal also, the government had been allowed a field day in denaturalizing citizens on flimsy evidence where charges of Communist Party membership were involved. See, e.g., *United States* v. *Nowak,* 133 F. Supp. 191, aff'd 238 F. 2d 282, rev'd 356 U. S. 660; *United States* v. *Sweet,* 106 F. Supp. 634, and *United States* v. *Chomiak,* 108 F. Supp. 527, both aff'd, 211 F. 2d 118, cert. den. 348 U. S. 817. This trend was not stopped until *Nowak* and *Maisenberg* were decided by this Court. Thus, in effect, the law was changed after petitioner's appeal was dismissed. A change of law after judgment has been held good cause under Rule 60 (b) for vacating a final judgment. *McGrath* v. *Potash,* 199 F. 2d 166; cf. *Block* v. *Thousandfriend,* 170 F. 2d 428; see *United States* v. *Ohio Power Co.,* 353 U. S. 98, 104, ftn. 13 (Harlan, J., dissenting).

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

JOSEPH FORER
DAVID REIN
711 14th St., N. W.
Washington, D. C.

DANIEL G. MARSHALL
SEYMOUR MANDEL
4041 Marlton Ave.
Los Angeles, California

Attorneys for Petitioner